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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Toll Free Service Access Codes

CC Docket No. 95-155

**SUPPLEMENTAL COMMENTS OF THE 800 USERS
COALITION**

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SUMMARY

The 800 Users Coalition ("Coalition") is a group of large 800 service customers that rely on the integrity and efficiency of toll-free services. The Commission's treatment of sensitive toll-free numbers when new toll-free Service Access Codes ("SACs") are introduced can either expand the use, and protect the viability, of existing toll-free services or severely compromise them. The Coalition urges the Commission to establish rules and policies which accomplish the former.

The utility of the toll-free services used by Coalition members depends on the Commission's treatment of "sensitive" toll-free numbers. Numbers become "sensitive" because they are used for widely-publicized marketing and high-volume call center functions or their mnemonic equivalents have become synonymous with a company (e.g., 1-800-HOLIDAY) or are a tool around which an entire business is built (e.g., 1-800-TEL-CONF). The Commission must permit customers with sensitive numbers to obtain their equivalents in new toll-free SACs in order to protect the calling public, existing toll-free customers, and new toll-free customers from confusion, misdials, and misuse of these numbers.

The introduction of the 888 SAC caused widespread consumer confusion and caller misdials that continue today. To reduce the incidence of caller misdials and the anti-consumer, anti-competitive consequences of misdirected calls, the Coalition urges the Commission to establish a right of first refusal for customers with sensitive numbers as to equivalent numbers in new toll-free SACs. Only a right of first refusal will protect consumers, existing toll-free

customers, and new customers from costly misdials and abuse by unscrupulous competitors. Moreover, data from 800 customers shows that only 5-6% of the *total* pool of toll-free numbers will be considered "sensitive" by toll-free customers. Thus, a right of first refusal will not unduly accelerate the exhaustion of new toll-free codes.

The Coalition opposes the use of lotteries or Standard Industrial Classification ("SIC") codes to distribute sensitive toll-free numbers. Lotteries are appropriate only where a resource has intrinsic value, each entity seeking the resource has the same equitable claim to it, and demand exceeds supply -- none of which is true in the case of sensitive toll-free numbers. Moreover, lotteries would not solve the problems resulting from caller confusion and misdials and would increase the opportunities for unscrupulous businesses or number brokers to appropriate the investment of incumbent toll-free customers in their sensitive numbers or to perpetrate consumer fraud on the public.

The use of SIC codes raises many of the same issues as lotteries. Screening for duplicative SIC code assignments would not address consumer confusion and misdials and, because fierce competitors in the same business can be (and are) assigned different SIC codes, would not protect toll-free customers and the calling public from unfair business practices or even consumer fraud.

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SUPPLEMENTAL COMMENTS OF THE 800 USERS COALITION

INTRODUCTION

The 800 Users Coalition ("Coalition") is a group of end users who rely upon 800 service to meet a number of crucial business needs, including ordering, reservation, and sales lines; customer service and technical support centers; and a variety of data-driven financial transaction services. Therefore, the Coalition members are vitally interested in issues concerning the treatment of sensitive numbers¹ raised by the Commission in its initial Notice of Proposed

¹ Although the Commission's Orders and request for supplemental comments refers solely to "vanity" numbers, the Coalition uses the term "sensitive numbers" to indicate that the seven-digit sequence in a toll-free number may require special treatment regardless of whether it spells out a corporate name or marketing phrase. The term "vanity" number is typically used to refer to telephone numbers that are easily remembered because of the words they spell out. See, e.g., *Nicholas Spill 1-800-DRTV; Profiting From 'Mistakes', The Vanity Number: Buyer Beware*, DM News, July 7, 1997, at 17 ("Spill Article"); Jon Van, *Toll Free Numbers are Adding Up; Area Code Confusion Spells Demand from Firms*, Chicago Tribune, Nov. 18, 1996, at C1 ("Van Article"). "Sensitive" numbers refers not only to vanity numbers but also toll-free numbers that generate high volume calling for other reasons, including that they are widely marketed, or numbers which are the central component around which a business is created. Comments of 800 Users Coalition, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 95-155, at 14 n.11 (November 1, 1995) ("Initial Comments").

Rulemaking in this docket² and its July 2, 1997 Public Notice seeking supplemental comments.³

Coalition members include many of the companies who have made toll-free service the highly successful and useful business tool that it is today. Coalition members have been able to use toll-free service to facilitate and expand their businesses in part because they have been able to rely upon the stability and public recognition of certain of their existing 800 number assignments. As detailed in the comments that follow, the central issue in this proceeding for Coalition members is the elimination of public confusion regarding those number assignments in order to preserve the invaluable business tool members have created through their use of toll-free services.

The 800 Users Coalition includes some of the country's largest companies and banks as well as growing entrepreneurial companies. The Coalition's members include the Ad Hoc Telecommunications Users' Committee, which represents a cross-section of the largest users of telecommunications services in the United States;⁴ the Banker's Clearing House which consists of Union Bank of California, City National Bank, Wells Fargo Bank, Sanwa Bank California and Bank of America; DeraVentures, Inc.; The New York Clearing House Association

² Toll Free Service Access Codes, *Notice of Proposed Rulemaking*, 10 FCC Rcd. 13692, (1995) ("Notice" or "NPRM").

³ Further Comments Toll Free Service Access Codes, *Public Notice*, CC Dkt. No. 95-155, (July 2, 1997) ("Public Notice").

⁴ Member companies collectively spend in excess of \$1 billion annually on interstate carrier services.

("NYCHA"), an association of financial institutions consisting of The Bank of New York, The Chase Manhattan Bank, N.A., Citicorp, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, European American Bank, Guaranty Trust Company and Republic National Bank of New York; Northwest Airlines, Inc.; Norwest Technical Services, Inc.; QVC, Inc.; and VISA USA, Inc.

In the Public Notice, the Commission asks parties to refresh the record in this proceeding on issues concerning the treatment of toll-free vanity numbers. Mindful of the Commission's directive that parties not reiterate earlier pleadings in this proceeding, the Coalition confines its supplemental comments to two issues.

First, the Coalition provides updated information regarding caller confusions and misdials resulting from the introduction of the 888 toll-free SAC. The risk of caller misdials, and the consumer frustration, potential for consumer fraud, and interference with business dealings resulting therefrom prompted the Coalition to advocate special protection for the equivalents of sensitive 800 numbers in other toll-free codes. In particular, the Coalition urged the Commission to grant holders of sensitive 800 numbers a right of first refusal as to the equivalent numbers in future "8YY" SACs to protect against caller confusion and the burdensome impact of that confusion on existing toll-free customers, new toll-free customers, and the calling public. While the Coalition's position on this issue has not changed since the initial pleading cycle closed, experience with the introduction of the 888 toll-free code in March 1996,

described in the paragraphs that follow, provides additional support for granting special treatment.

Second, the Coalition addresses the only new issue raised in the Public Notice -- the use of a lottery to distribute toll-free vanity numbers. The Coalition opposes a lottery because it is an ineffective means of protecting equivalent 800 numbers in other toll-free codes against caller misdials, consumer fraud, and the problems resulting from misdirected calls.

I. DESPITE EXTENSIVE PUBLIC EDUCATION EFFORTS, AND THE ISOLATION OF SENSITIVE TOLL-FREE NUMBERS, CALLER MISDIALS TO 800 NUMBER EQUIVALENTS IN THE 888 TOLL-FREE CODE HAVE BEEN FREQUENT AND FRUSTRATING

In its Initial Comments, the Coalition urged the Commission to grant sensitive toll-free numbers special protection in subsequent toll-free SACs, because absent such protection the incidence of caller misdials would be unreasonably high and would result in customer frustration, potential consumer fraud, and inconvenience both to the caller and the affected businesses.⁵ At the time, the Coalition based its argument on its member's experience with misdials of 800 numbers.⁶

Practical experience since the 888 code was introduced confirms that the Coalition's risk assessment was accurate. With the exception of "888 equivalents designated by current 800 subscribers" to be set aside -- i.e., the

⁵ Initial Comments at 14-15.

⁶ *Id.* at 15.

sensitive toll-free numbers -- the 888 SAC was deployed as of March 1, 1996.⁷ Actual calling experience since then has demonstrated the likelihood and adverse effects of caller misdials to the 888 equivalents of sensitive toll-free numbers. The data associated with the 888 SAC is ominous for two reasons. First, caller confusion has resulted despite an extensive public education campaign regarding the introduction of 888 calling,⁸ which included, according to press reports, the fact that 888 and 800 numbers are not interchangeable, and that they route calls to different locations.⁹ Second, the experience gained thus far is with those 888 numbers for which no 800 number holder requested classification as "unavailable," and should therefore have been among the *least* likely to experience significant caller misdials and confusion. The data described below are based on news reports so they therefore understate the incidence of caller confusion by omitting similar events that did not receive similar press coverage.

⁷ Letter from Regina M. Keeney, Chief, Common Carrier Bureau, to Michael Wade, Pres., Database Service Management, Inc., (February 29, 1996) (in reference to CC Dkt. No. 95-155); Toll Free Service Access Codes, *Report and Order*, 11 FCC Rcd. 2496 (1996); Toll Free Service Access Codes, *Order*, 11 FCC Rcd. 3045 (1996).

⁸ Toll Free Service Access Codes, Petition to Modify 888 Number Allocation Plan filed by LCI International, Inc., Petition to Modify 888 Number Allocation Plan filed by UniDial, Inc. and Petition to Modify 888 Number Allocation Plan filed by Consolidated Communication Telecom Services, Inc., *Second Report and Order and Further Notice of Proposed Rule Making*, CC Dkt. No. 95-155, NSD File Nos. 97-10, 97-15 and 97-16, para. 87 (April 11, 1997) ("Second Report and Order").

⁹ Lisa Gonderinger, *Telcos Hang Up On 800, Dial Into Toll-Free 1-888*, Business Journal-Phoenix and the Valley of the Sun, October 13, 1995, at 1; *AT&T Launches Campaign To Educate Public On 888 Numbers*, Common Carrier Week, August 21, 1995; *AT&T Launches Campaign To Educate Public About 888 Numbers*, Communications Daily, August 17, 1995, at 1.

A. Frequent Incidents of Caller Misdials Have Been Reported In the Wake of the Introduction of the 888 Code.

More than a year after the introduction of 888 codes, many callers apparently still either fail (1) to recognize that 888 is a toll free code similar to 800 and that 800 and 888 numbers are *not* interchangeable; or (2) to implement that knowledge, and instead dial the traditional 800 SAC for all toll-free calls.

In May of this year, fourteen months after the introduction of the 888 SAC and twenty months after the public education campaign began,¹⁰ callers in Oakland, California continued to confuse 800 and 888 numbers. When told to dial 1-888-4-HBA-INFO (1-888-442-24636) to register to win a condominium, calls instead flooded in to the 800 equivalent -- 1-800-422-2463, the toll-free number for the International Communications Association in Dallas.¹¹

In February of this year, almost a year after the 888 code was introduced and seventeen months into the public education campaigns, the Daily News (New York) published a story giving an 888 number (888-346-6329) for a restaurant service listing. Soon after printing the story, a family with a telephone

¹⁰ Second Report and Order at para. 87 (recognizing that AT&T began its public education efforts in September 1995).

¹¹ Larry Barrett, *888 Number Takes Its Toll on InfoPoint*, Business Journal-San Jose, May 12, 1997, at 1 ("Barrett Article"). As mentioned in the Coalition's Initial Comments, misdials may occur in a variety of ways, some of which are more predictable than others, such as the substitution of the numeral "0" for the letter "O" or the numeral "1" for the letter "I" in a mnemonic. See, e.g., Spill Article at 17; Loren C. Stocker, *1-800-Get-Results; The Strategy and Reasoning Behind Selecting Vanity Numbers*, DM News, June 10, 1996, at 21 ("Stocker Article"). Not surprisingly, many condo hopefuls misdialled the promotional number by dialing 1-888-422-4636, the toll-free number for InfoPoint in Santa Cruz, California, when they were confused by 12 digits and decided to omit the initial "4".

number similar to the 888 number began receiving large numbers of misdirected calls -- 50 on one day alone.¹²

Last fall, after six months of practice with 888 numbers and a year of public education, an incident with one of the highest ratio of caller misdials to calls completed to the correct toll-free number occurred. In the aftermath of Hurricane Fran, the Federal Emergency Management Agency established a toll-free number (888-TREE-OFF or 888-873-3633) for tree removal. Many people, however, still associated a toll-free call with the traditional 800 numbers, and called 800-873-3633 instead. Big Boy restaurants had been using the 800 number equivalent for customer relations, which typically received around 12 calls a day. With the introduction of the 888 equivalent, Big Boy began receiving an average of 430 calls per day -- approximately 97% of which were placed to reach FEMA.¹³ In fact, one newspaper reported that 5,874 calls had been placed to the 888-TREEOFF number, while 3,600 calls had been misdialed.¹⁴

Last summer, BellSouth introduced an 888 number for questions about the introduction of a new area code. Many callers mistakenly dialed the equivalent 800 number instead, and were connected with a telephone sex line.¹⁵

¹² Sallie Han, *Front Burner*, Daily News (New York), Feb. 26, 1997, at 3.

¹³ Sarah Avery, *Big Boy's Got FEMA's Number*, The News and Observer (Raleigh, NC), Sept. 27, 1996, at A1. Gerrie Ferris, *Hey, Big Boy*, The Atlanta Journal and Constitution, Oct. 1, 1996, at B2.

¹⁴ *Week Six Since Hurricane Fran*, The News and Observer (Raleigh, NC), Oct. 18, 1996, at B1.

¹⁵ *Confused Callers Mix Up Florida Area Code Help Line with Sex Line*, Agence France Presse, Aug. 3, 1996.

The most reports of 888 misdial incidents occurred in May 1996, several months after the introduction of the 888 code and many months after the public education campaign had kicked into high gear. Methodist Hospital in Memphis, Tennessee, for example, usually received about 300 calls each month to its toll-free Helpline (800-782-7872). When Motorola began a cellular promotion using the number 888-StarTRAC (888-782-78722), Methodist Hospital began receiving several hundreds of misdirected calls a day to the 888 number.¹⁶ Similarly, when a newspaper promoted the sale of basketball-related merchandise with an 888 number, many callers simply dialed 800 instead of 888 and reached a San Francisco firm that had nothing to do with the promotion.¹⁷ And, when the Catfish Institute offered a new brochure, which could be requested by dialing 888-451-3474, calls once again did not reach the intended recipient. The newspaper that printed the story recounting the event felt it necessary to make clear that "Yes, the 888 number is correct."¹⁸

Most 888 equivalents of "sensitive" numbers have not been assigned and put into use since the 888 code was introduced. Some 888 equivalents of sensitive 800 numbers have, however, been introduced with disastrous results. For example, Similac had been using 800-FORMULA (800-367-6852) to market its baby formula. Racing Systems, Ltd., was then assigned 888-FORMULA

¹⁶ Stocker Article at 21. Patti Patterson, *Tempers Tested By Toll-Free Talkers*, The Commercial Appeal (Memphis), May 17, 1996, at B1.

¹⁷ Art Nauman, *You Can't Be Too Careful*, Sacramento Bee, May 26, 1996, at B1.

¹⁸ *Catfish Confusion*, Asheville Citizen-Times (Asheville, NC), May 8, 1996, at C5.

(888-367-6852) and has been using it to market its product. Because of the calling public's familiarity with the traditional use of the 800 SAC, Similac received many misdirected calls intended for Racing System, and Racing System received few of its intended calls, resulting in "two unhappy toll-free users - one losing business, the other incurring the cost of unwanted misdials."¹⁹

A similar situation occurred when the 888 equivalent of the 800 SPACEUS number was assigned to Mission HOME. Mission HOME is an advocacy group of the space program. The 800 SPACEUS number is assigned to Space Diagnostics Inc., which consults with hospitals on design issues. During a promotion of a former Apollo 13 astronaut's visit to the Maryland Science Center, many callers dialed the 800 number instead of Mission HOME's 888-SPACEUS, which meant that Space Diagnostics (a small firm without a receptionist) was forced to spend a significant amount of time answering misdirected calls.²⁰

All of the foregoing supports the recent statement by one 800 number holder that "[p]eople still call an 800 number when they seek the 888 number in a DRTV commercial. They let their fingers do the walking and don't realize the other area code."²¹

¹⁹ Jonathan Boorstein, *1-800-Vanish: Telemarketers Fear Trademark Numbers May Disappear Under Proposal*, Direct, Feb. 1997, at 13.

²⁰ Timothy J. Mullaney, *Toll-Free Dialing Goes Crazy With 8's; Callers Are Unaware Of New 888 Area Code*, Baltimore Sun, July 30, 1996, at C1.

²¹ Nicholas Spill, *888 Numbers Slowly Gain Acceptance*, DM News, May 19, 1997, at 18.

B. Caller Misdials to Numbers Within the 800 Code Continue To Be Significant, Despite the Public's Thirty Years of Experience With 800 Numbers.

As indicated in the Coalition's Initial Comments, the incidence of caller misdials to sensitive numbers within the 800 code is significant.²² This is true despite the fact that the public has had over thirty years of experience using 800 numbers to place toll-free calls,²³ and, as evidenced by the incidents described above, continues to associate the 800 SAC exclusively with toll-free dialing.

The Coalition has updated its data regarding misdials to the sensitive 800 numbers of Coalition members, which were provided to the Commission at the time of the initial pleading cycle. Members continue to experience a substantial number and percentage of misdials to other 800 numbers associated with their sensitive 800 numbers. One member of the Coalition averages between 60,000 and 70,000 misdialed calls per month on its so-called "fat finger" 800 numbers.²⁴ Similarly, another Coalition member reports that, on average, 10% of the 800 calls completed to one number, 800-TEL-CONF (800-835-2663), were intended

²² Initial Comments at 15.

²³ See, e.g., Patty Tascarella, *Businesses Will Start Scrambling When The Bell Tolls For 800 Numbers*, Pittsburgh Business Times and Journal, Oct. 2, 1995, at 15; Tim Landis, *800 Is Not Enough Toll-Free Demand Forces Creation Of New Numbers*, The State Journal-Register (Springfield, IL), June 4, 1997, at 23 ("Landis Article"); Van Article at C1; Phil Mulkins, *Don't Fret Dialing 888 But Beware 809, 758 and 664*, Tulsa World, Feb. 21, 1997, at A2.

²⁴ As the Coalition explained previously, "fat finger" numbers are the most commonly misdialed equivalents of frequently used numbers. The misdial may occur because callers have inadvertently pressed the wrong button or because they have misremembered the proper dialing sequence. The traditional response to this phenomenon has been to assign both the intended number and the commonly-misdialed (or "complementary") versions of that number to the same toll-free customer. The incidence of misdials experienced by American Airlines has increased since the Initial Comments were filed and were reported in an article. Initial Comments at 15; FCC

to another, 800-WELCOME (800-935-2663). Thus, consumer misdials continue to be significant among the members of the Coalition, and, in the aggregate, the experiences of such members are entirely consistent with those of other toll-free customers, who reportedly experience misdialled calls of between 2% and 6% of their total toll-free calling volumes.²⁵

Misdialled calls have historically been a chronic problem for toll-free service. Actual experience following the introduction of the 888 SAC confirms that the new SAC has not altered that pattern. Accordingly, the Commission must provide special protection to sensitive toll-free numbers in subsequent toll-free SACs to protect the public and number holders against the frustration, potential for consumer fraud, inconvenience, and costs associated with misdirected calls.

II. SENSITIVE TOLL-FREE NUMBERS MUST BE PROTECTED BY A RIGHT OF FIRST REFUSAL AS TO EQUIVALENT NUMBERS IN SUBSEQUENT TOLL-FREE CODES

Protection against caller misdials and the problems associated with such misdials is the basis upon which special treatment of sensitive toll-free numbers in subsequent toll-free codes rests. As indicated above, caller misdials between 800 and 888 numbers and within the 800 code remain significant. Granting the sensitive toll-free number holder a right of first refusal to equivalent numbers in

Wants 888 Numbers Back, Telecommunications Alert, Aug. 8, 1996. For a discussion of "complementary" numbers, see *infra* n.27.

²⁵ Bradley Foster, *Beneath The Bottom Line*, Home Office Computing, June 1996; Spill Article at 17.

subsequent toll-free codes is the only means of providing adequate protection against caller misdials.

As discussed in the Initial Comments, caller misdials are not in the public interest because they result in consumer confusion and permit entities to engage in consumer fraud or to otherwise undermine the business of the toll-free number holder whose use of the sensitive number created the initial caller recognition and reliance.²⁶ A right of first refusal would protect the legitimate interests of the toll-free number holder, including its investment in creating caller recognition and reliance, by reducing the likelihood of misdials. As suggested by the news reports above, if the holder of an 800 number is also assigned its 888 equivalent, a caller that was confused and thought the two numbers were interchangeable would reach its intended recipient by dialing either the 800 or the 888 number. The call would in either case end up with the intended recipient. This would prevent the opportunity for consumer fraud. The holder of the 888 number would be the same as that of the 800 number and the caller would receive the quality and level of service to which it had become accustomed with the 800 number, rather than that of an entity seeking to compete with the 800 number holder by surreptitiously diverting the 800 number holder's customers.

The assignment to a toll-free number holder of the numbers most commonly misdialed by callers seeking to reach it is a long-standing tool for

²⁶ Initial Comments at 18-19.

managing number resources efficiently,²⁷ and one which was recently countenanced by a Federal Court of Appeals. In 1996, the Sixth Circuit Court of Appeals recognized the importance of this tool where the law fails to provide protection against unfair business practices. In denying claims of trademark infringement and unfair business practices under the Lanham Act for use of an 800 number resembling Holiday Inn's 1-800-HOLIDAY, the Court implicitly blamed Holiday Inns for its predicament. The court wrote that "Holiday Inns neglected to take the simple precaution of reserving its complementary number -- a practice which many of its competitors have chosen to take."²⁸ A sensitive number holder -- like Holiday Inn -- will only be able to engage in this form of self-help, however, if the Commission grants it a right of first refusal for its sensitive toll-free numbers.

The Commission should combine a right of first refusal with the delayed release of sensitive toll-free numbers in subsequent toll-free SACs. A right of first refusal will not necessarily be exercised by the number holder. If a sensitive number is then made immediately available for assignment, caller misdials and frustration and confusion are likely to be high. Nor would delaying release of such numbers until no others remain available in a particular toll-free code exhaust the supply. The total pool of sensitive numbers has been estimated to

²⁷ Numbers that are frequently misdialed or to which misdials are predictable are referred to in the trade as "complementary" numbers. See, e.g., *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619, 621 (6th Cir. 1996); Barry R. Shapiro, *Protecting Vanity Numbers; Some 800 Numbers Spell Legal Problems*, Marketing Management, 1996 Spring, at 47; Stocker Article at 21; Spill Article at 17.

²⁸ *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619, 625 (6th Cir. 1996).

be around 6% of the total numbers available in a toll-free code,²⁹ and the experience with the 888 code shows it to be less than 5%.³⁰

III. A LOTTERY MECHANISM WOULD BE INCONSISTENT WITH THE PUBLIC INTEREST

In the Public Notice, the Commission proposes for the first time to use a lottery to assign sensitive toll-free numbers. The Coalition urges the Commission to reject a lottery as inconsistent with the public interest.

Lotteries may be an appropriate means of distributing limited resources, but only where (a) the resource has intrinsic value, (b) each entity seeking the resource has the same equitable claim to it; and (c) demand for the resource exceeds supply. None of these prerequisites exists with respect to sensitive toll-free numbers.

Telephone numbers have no intrinsic value. Any value in the number derives solely from the toll-free customer's investment in the number which stimulates customer use and/or recognition of the number. A lottery would deny customers who have invested in toll-free services the benefits of their investment.

Competing entities seeking the same toll-free telephone number do not necessarily have the same equitable claim to it. The number is typically sensitive only because of the initial holder's considerable investment in using

²⁹ Initial Comments at 15-16.

³⁰ Of the 8 million numbers available in the 888 code, only around 375,000 were designated as sensitive. Landis Article at 23; Keith A. Barritt, *Toll Free Exchange?*, Legal Times, Apr. 7, 1997, at 52 ("Barritt Article")

and/or marketing it. The initial holder thus has a stronger equitable claim to an equivalent number than other potential lottery participants.

An entity that is interested simply in obtaining a toll-free number for use in the sales and marketing of its own product or service would be better served by a number assigned on a first-come, first-served basis from the general pool of numbers available for assignment. As demonstrated in the case of the SPACEUS and FORMULA toll-free numbers described above, a new toll-free customer can be grievously mis-served, in terms of clogged toll-free lines, caller confusion, and lost business, by the assignment of an existing sensitive toll-free number equivalent.

Legitimate customers of toll-free services would no doubt prefer, and would be better served by the Commission through, an assignment mechanism that could not saddle them with a sensitive toll-free number, as a lottery for the "unavailable" 888 toll-free numbers would certainly do. Customers who seek out a sensitive number, on the other hand, and force the assignment process into a lottery are more likely to be unscrupulous businesses seeking to capitalize on the investment made by the incumbent holder of the sensitive number or to broker the number to the incumbent holder for which the number has legitimate value. The law is insufficient to protect against the former behavior,³¹ while the Commission's brokering prohibitions³² are insufficient by themselves to

³¹ See, e.g., *Holiday Inns v. 800 Reservation, Inc.*, 86 F.3d 619 (6th Cir. 1996); Barritt Article at 52; Initial Comments at 21-22.

³² Second Report and Order at paras. 38-39, 42.

discourage the latter behavior, as shown by the fact that Coalition members continue to be approached by number brokers.

Finally, unless the initial number holder either wins the lottery or pays the bounty sought by a number broker, lotteries do not solve the problem of caller misdials. Sensitive toll-free number equivalents in other toll-free codes would immediately be put to use by the winner of a lottery for such numbers, and the calling public would continue to be confused and inconvenienced by misdials. Such a situation is contrary to the public interest.

IV. STANDARD INDUSTRIAL CLASSIFICATION CODES ARE INEFFECTIVE AT PROTECTING AGAINST CONSUMER FRAUD AND DO NOTHING TO REDUCE THE FRUSTRATION AND CONFUSION RESULTING FROM CALLER MISDIALS

The Commission's proposal to use Standard Industrial Classification Codes ("SIC codes"), presumably in connection with the first-come, first-served approach currently used to distribute numbers within a toll-free code, has superficial appeal as protection against consumer fraud or anti-competitive business practices. As the Coalition demonstrated in its Initial Comments, however, SIC codes would provide no such protection in practice.³³ A powerful example of the inadequacy of the SIC code proposal was described in the Coalition's Initial Comments. Even though United Parcel Service (more commonly known as UPS) and the Federal Express Company (more commonly known as FedEx) compete fiercely in their primary line of business -- package

³³ Initial Comments at 22-23.

delivery services, they have different SIC codes.³⁴ The Commission's proposal would not prevent one of these fierce competitors from obtaining the equivalent of the other's sensitive toll-free number in a subsequent toll-free code.

Moreover, the SIC code proposal does nothing to reduce the incidence of and frustration created by caller misdials. As discussed in connection with the lottery, this proposal would allow the immediate use of an equivalent of a sensitive toll-free number in a subsequent toll-free code and result in a situation that is unsatisfactory for both the caller and even a legitimate assignee in the subsequent code since callers can still be expected to mistakenly dial the wrong toll-free SAC.

CONCLUSION

It is the Commission's responsibility to ensure that the manner in which sensitive toll-free numbers are distributed serves the public interest. The public interest requires protection for (1) the calling public against the frustration and confusion created by misdials, (2) the incumbent number holder against unscrupulous dilution of its investment in developing the value in the number, and (3) innocent number holders in subsequently opened toll-free codes against the cost and inconvenience of receiving misdirected calls. For the foregoing reasons, the Coalition urges the Commission to (a) grant holders of sensitive toll-free numbers a right of first refusal with respect to the equivalent of such number in subsequently opened toll-free codes, and (b) reject the use of either lotteries

³⁴ Initial Comments at 23.

or SIC codes to distribute such numbers. These measures will preserve and enhance the value of toll-free services while furthering the Commission's statutory and regulatory goals.

Respectfully submitted,

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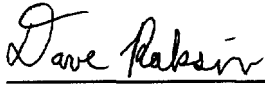
July 21, 1997

Certificate of Service

I, Dave Raksin, hereby certify that true and correct copies of the preceding Supplemental Comments of the 800 Users Coalition in the Matter of Toll Free Service Access Codes pursuant to the Commission's July 2, 1997 request for further comments regarding CC Docket No. 95-155 were served this 21st day of July, 1997 via hand delivery upon the following parties:

ITS*
1919 M Street, N.W.
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Dave Raksin

July 21, 1997

*By hand delivery